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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL O'HICKEY,

Defendant and Appellant.

2d Crim. No. B211617  
(Super. Ct. No. LA059454)  
(Los Angeles County)

Michael O'Hickey appeals a judgment following conviction of receiving stolen property. (Pen. Code, § 496d, subd. (a).)<sup>1</sup> We affirm.

*FACTS AND PROCEDURAL HISTORY*

On June 12, 2008, Maria Martinez reported to Los Angeles police officers that her 2007 Ford automobile was missing and that she had not given another person permission to take it. The automobile had no decals or stickers.

Approximately one month later, Los Angeles Police Officer Jamie McBride was observing a residence on Remmet Avenue in Canoga Park, looking for Tony Jopling. O'Hickey and others resided there. McBride saw O'Hickey (whom he knew as "Irish Mike"), Jopling, and Rachel Nigley leave the residence. Jopling and Nigley were placing items into a Mercedes automobile.

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<sup>1</sup> All further statutory references are to the Penal Code.

McBride detained the three and searched the residence. In a room containing female clothing, he found an "extremely small quantity" of methamphetamine. McBride believed the amount, although small, was useable. While McBride discussed his finding with another officer, O'Hickey volunteered that the methamphetamine was his.

McBride also found an automobile key laying on a coffee table. He used the key to unlock the door of a Ford automobile parked in front of the residence. The automobile had no license plate and a lottery ticket covered its vehicle identification number. An "Irish Pride" sticker was attached to the exterior. A 2007 pay stub bearing O'Hickey's name lay on the front floorboard. McBride checked the vehicle identification number and learned that Martinez had reported the automobile as stolen.

In a police interview after his arrest, O'Hickey stated that another person brought the automobile to him and stated that it was stolen. O'Hickey stated that he volunteered to "get rid of [the automobile]."

At trial, Jopling testified that he left the methamphetamine on a dresser for O'Hickey's wife. He also stated that he bought the stolen Ford automobile for \$250 and that he placed the "Irish Pride" sticker on it. Jopling admitted that he had a long criminal history, was a member of a white supremacist gang, and that McBride arrested him for being a felon in possession of a firearm.

The trial court instructed with CALCRIM Nos. 376, 1750, and 2304 regarding possession and control. During deliberations, the jury inquired: "What constitutes possession? [¶] (a) pertaining to law [¶] (b) pertaining to drugs [¶] (c) pertaining to car[?]" and "Does key on coffee table constitute possession by specific individual (owner of home)?" In response, the trial court referred the jury to the instructions already given regarding possession, and it reread portions of CALCRIM Nos. 1750 and 2304. It then added: "The law as it relates to possession for both counts . . . is the same. . . . [¶] There are two kinds of possession: actual possession and constructive possession. [¶] 'Actual possession' requires that a person knowingly

exercise direct physical control over a thing. [¶] 'Constructive possession' does not require actual possession but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons. [¶] One person may have possession alone, or two or more persons together may share actual or constructive possession. Physical possession is not required, it is sufficient if the defendant acquires a measure of control or dominion over the stolen property." The court also instructed: "The court will not comment on the meaning and significance of evidence. These are matters for the jury's determination."

The jury convicted O'Hickey of receiving stolen property (count 1) and acquitted him of possession of methamphetamine (count 2). Separately, O'Hickey admitted that he served two prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced him to a prison term of four years, consisting of two years for the offense and one year for each of the two prior prison terms served.

O'Hickey appeals and contends that the trial court erred by instructing with the supplemental instruction regarding constructive possession of the stolen automobile.

### *DISCUSSION*

O'Hickey argues that the trial court's supplemental instruction impermissibly led the jury to find that the automobile key was conclusive proof of his possession. He asserts that the instruction is erroneous because it refers to "a measure of control or dominion over the stolen property." O'Hickey objects to the phrases "a measure of control" and "stolen property." He contends that the supplemental instruction lessened the prosecutor's burden of proof and is not harmless beyond a reasonable doubt. O'Hickey adds that the court erred by not instructing that the presence of the key on the coffee table was circumstantial, not conclusive, evidence of possession.

The trial court properly instructed with pattern instructions regarding possession and control of stolen property and narcotics. (CALCRIM Nos. 1750, 2304.)

The supplemental instruction also correctly states the law regarding possession of stolen property. (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 728; *People v. Grant* (2003) 113 Cal.App.4th 579, 596.) "The requisite possession of the stolen property may be either actual or constructive, and need not be exclusive. In fact, physical possession is not required, as it is sufficient if the defendant acquires a measure of control or dominion over the stolen property." (*Anthony J.*, at p. 728.)

In any event, any error regarding the supplemental instruction is harmless under any standard of review. O'Hickey informed Officer McBride that he knew the automobile was stolen; Jopling testified that he knew the automobile was stolen when he purchased it. Under the circumstances, the phrase "stolen property" did not lessen the prosecutor's burden of proof.

The automobile displayed an "Irish Pride" sticker on the trunk, and O'Hickey's nickname is "Irish Mike." His pay stub from 2007 lay on the front floorboard of the automobile. This evidence reflects more than "a measure of control" over the automobile. (*In re Anthony J.*, *supra*, 117 Cal.App.4th 718, 728.)

Moreover, the trial court properly refrained from instructing that the presence of the key was circumstantial, not conclusive, evidence of possession. The court correctly instructed with CALCRIM No. 222, concerning the jury's role as factfinder.

The supplemental instruction states that actual and constructive possession require "knowing[]" possession. We presume the jury understood, correlated, and followed the instruction. (*People v. Osband* (1996) 13 Cal.4th 622, 714; *People v. Scott* (1988) 200 Cal.App.3d 1090, 1095.)

We disagree that the "a measure of control" language relating to the stolen property count explains O'Hickey's conviction on that count and his acquittal on the methamphetamine count. The small amount of methamphetamine may not have been a useable amount. Moreover, the automobile contained O'Hickey's pay stub and had an

"Irish Pride" sticker attached to the exterior. Evidence of the stolen property count was strong compared to the possession of methamphetamine count.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Martin L. Herscovitz, Judge

Superior Court County of Los Angeles

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